Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Leased Commercial Access	MM Docket No. 92-266 CS Docket No. 96-60

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REPLY COMMENTS OF
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Introduction

Continental Cablevision respectfully submits its Reply Comments in this proceeding.

With ample opportunity to lay the factual and legal basis for subsidized commercial leased access, not one comment has provided any support for the Commission's proposal to reduce commercial leased access prices to nominal levels. The proposal is, in fact, misguided and threatens to undermine the growth of diverse quality programming.

I. The NPRM Proposal to Subsidize Leased Access Programmers Would Spawn Distortions and Dislocations in the Marketplace

The proposal in the NPRM would reduce commercial leased access prices to nominal levels, rather than require leased access programmers to pay real marketplace rates. There is no legal basis for imposing such distortions and dislocations. The principal achievement in doing so, moreover, would be the saturation of cable channels with shopping channels and infomercials. Valuevision itself submitted an appendix with an admission that only shopping channels and infomercials can squeeze into the economic formula laid out by the NPRM.[1] These are hardly the diverse programming sources intended by Congress.

But the Comments give a further glimpse into the distortions which arise when subsidies are introduced into leased access. Those who support the Notice do not even pretend to advocate a regime based on the marketplace. LPTVs and nonprofits, for example, recognize that subsidized leased access channels will be monopolized by home shopping channels and infomercials unless artificial advantages, setasides, and quotas protect them from such programmers. Each group therefore advocates some special set aside which will provide them free carriage on cable, protected even from the competing claims of other prospective free riders. This is merely the tip of the iceberg: if 15% of cable channel capacity is in play, the Commission must expect every other programming source to start advocating its "right" to a particular set aside.

These artificial preferences would cause marketplace distortions *in addition to* those identified by Continental in it's initial Comments: the disruption to customers; the

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[1] ValueVision Comments, Attachment A at 6 (acknowledging that direct marketers, home shopping, and infomercials are likely to be dominant users of leased access).

dislocation of new, innovative programmers; the interference with existing contracts and even the frustration of retransmission consent arrangements.**

II. The NPRM Proposal Fails to Measure Opportunity Costs or Real Embedded Costs

In Continental's opinion, the principle failure of the Notice stems from ignoring the true opportunity costs associated with leased access channels. As Continental explained in its initial Comments, channels are not fungible commodities to which subscribers are indifferent. Instead, they are carefully managed properties which are utilized to attract and retain the selected audiences needed to maintain the dual revenue structure on which the cable industry has been built. Any proposal to nullify those market judgments must value and compensate operators for the loss of audience, the inability to cultivate demographics of interest to new classes of advertisers, and the lost opportunity to attract audiences who have been disaffected from current offerings or have never subscribed to cable.

Continental has submitted compelling empirical data on such opportunity costs. It commissioned The Research Network to conduct an independent market survey of Broward County, Florida cable customers who should be the ultimate judges of cable programming. Continental's customers indicated widespread allegiance to existing channels and a stunning proclivity (30% +) to drop or downgrade cable subscriptions if cable programming was replaced wholesale with subsidized leased access. The only other empirical data submitted in this proceeding corroborates the Research Network's findings. Talmey-Drake surveyed cable customers in Washington, DC, Denver, CO, and Seattle, WA with a separate survey instrument using a different style and format of questioning. The results were remarkably consistent, confirming the potential for substantial audience losses if cable channels are replaced wholesale with leased access channels.[2] The potential for loss of subscribers is only the *first* aspect of the opportunity costs. Opportunity costs are incurred even when an existing channel is not displaced. For example, a leased access programmer which occupies a channel prevents the operator from thereafter using that channel to develop a new audience of interest to a new class of advertisers. The NPRM's failure to account for such opportunity costs makes it indefensible.

Moreover, Continental submitted compelling information demonstrating that the embedded economic costs of these channels is well above even the benchmark rates on which the interim leased access rules are based. Costs developed through the extensive cost of service filings which Continental submitted to the Commission demonstrate that operators have built systems and gained audiences with long losses and deferred returns. Such costs must be valued when identifying the true economic costs of a fully-penetrated channel turned over to leased access.

III. NCTA's Proposal Would Reasonably Fulfill Leased Access Requirements

Although Continental believes that a rate of $0.89/sub/mo could be used as the going rate, we believe that the proposal advanced by NCTA is equally supportable. Continental

[2] Comments of Tele-Communications, Inc. at App. G.

supports NCTA's proposal that leased access may be priced at an average channel rate, net of average programming costs (plus an appropriate markup of at least 11.25%) and that individual prices to leased access programmers may be varied to equal that average. The proposal to match average channel revenues with average programming costs takes an accurate snapshot of current revenues from the "average channel." While not precisely measuring the underlying embedded and opportunity costs of each particular channel devoted to leased access, it represents an administratively workable solution which is flexible enough to be tailored to the differing economics of different owners. It ensures sensible results, regardless of variations in the average programming costs on each tier, by averaging channel rates across all BST and CPST offerings. In order to implement NCTA's proposal, we recommend that the Commission adopt the following clarifying details which would make the NCTA proposal work well.

The average channel rate accounts only for subscriber revenues, which does not capture even the current marketplace revenue associated with the average channel. Given that cable operators and cable programmers rely upon both subscriber revenues and third party (advertising) revenues to sustain cable programming, any leased access regulation seeking to emulate market value must value both revenue streams. Increasing the 11.25% markup would help account for this aspect of channel valuation.

In addition, if the 11.25% (or greater) markup is to be compensatory, it should be grossed up for taxes, as is the return component in Form 1205.

Lastly, any cable operator should be permitted to develop its leased access rates under cost of service principles, even if its subscriber rates are set at (or below) benchmark. A cable operator regularly makes the decision to forgo the current recovery of costs in order to gain subscribers. There is no reason that leased access programmers should be given the benefits of such discounting when reciprocal benefits cannot accrue to the cable operator.

Continental further supports NCTA's proposal that a cable operator should be allowed to negotiate a variety of leased access rates, provided that the operator's average leased access rate does not exceed the "average channel" rate discussed above. This approach would enable an operator to meet its aggregate leased access obligation and still negotiate a relatively low rate with a minority, educational, or local programmer and a higher rate with other potential channel lessees. This option not only comports with the right afforded a cable operator by the statute to "consider [leased access] content to ... establish a reasonable price;" it would also mitigate the harmful effects that will otherwise accompany a general reduction in the maximum permitted rate for leased access use. It is far preferable to the creation of artificial categories, rigid quotas, or special discounts.

IV. Part-Time Lease Prices Should be Deregulated or Priced to Recover Unleased Time

All of the comments recognize that part-time leased access programmers pose a serious problem to the efficient use of channels by other programmers and to a cable operator's ability to recover the costs of that channel. Cable operators have no market power against advertisers or infomercial producers, all of whom have access to a large number of video outlets for infomercials and advertising at competitive rates.[3] There is neither an economic nor legal basis for providing subsidies to part-time programmers. Continental therefore renews its recommendation that the rates for part-time channel leases be deregulated. In the alternative, those who wish to rent part-time channels should be required to pay for the unused time on that channel unless and until it is rented by other leased access programmers.

V. A Transition Mechanism Must be Adopted to Prevent Sudden Dislocations

As Continental explained in its initial Comments, any major change in commercial leased access pricing must be phased in gradually in order to avoid massive disruption for Continental and its cable customers. Disruption would include the risk of breach of Continental's carriage contracts, which have an average term length of more than six years, and an average of almost four years to run before expiration; disruption to existing "neighborhoods" of channels, which are often constrained by the technical limits of traps and filters; disruption to new, innovative programmers and even to the retransmission consent process, which frequently relies upon carriage commitments. The Commission should adopt a nationwide phase-in of any new leased access carriage requests to prevent dislocation for cable operators, programmers, and subscribers.

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[3] See Comments of Continental Cablevision at 26-29.

Conclusion

Continental submits that any formula for setting leased access rates must take full account of the opportunity costs for leasing channels as well as the actual costs of operating a cable system. NCTA's Average Channel Rate Formula and Leased Access Rate Averaging should be adopted (with the clarification noted in these comments) as a reasonable surrogate for calculating such costs. Part-time lease rates should be deregulated or priced to recover unleased time. A transition mechanism should be adopted to prevent sudden market dislocations.

Respectfully submitted,

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